63 FLRA No. 125

UNITED STATES DEPARTMENT
OF HOMELAND SECURITY
BORDER AND TRANSPORTATION
SECURITY DIRECTORATE
BUREAU OF CUSTOMS AND
BORDER PROTECTION
WASHINGTON, D.C.
(Respondent)

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES
NATIONAL BORDER
PATROL COUNCIL
(Charging Party)

WA-CA-02-0811

60 FLRA 943 (2005)

DECISION AND ORDER ON REMAND

May 29, 2009

Before the Authority: Carol Waller Pope, Chairman and Thomas M. Beck, Member

I. Statement of the Case

This matter is before the Authority on remand from the United States Court of Appeals for the District of Columbia Circuit in *AFGE, National Border Patrol Council v. FLRA*, 446 F.3d 162 (D.C. Cir. 2006) (*Nat'l Border Patrol Council*). In the original decision in this case, the Authority dismissed the complaint, which alleges that the Respondent violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by: (1) changing the number of hours of remedial firearms training provided to employees; and (2) repudiating a memorandum of understanding (MOU) concerning the above matters. *United States Dep't of Homeland Sec., Border & Transp. Sec. Directorate, Bureau of Customs & Border Prot., Wash., D.C.,* 60 FLRA 943, 952 (2005) (then-Member Pope dissenting) (*Customs*). Subsequent to the remand, the Respondent requested leave to supplement the record, which the General Counsel (GC) and the Charging Party oppose.

In *Nat'l Border Patrol Council,* the court held that the Authority improperly applied the *de minimis* standard, and that the reduction in the number of remedial training hours had more than a *de minimis* effect on working conditions. The court also set aside the Authority's finding that the Respondent did not repudiate the MOU. On remand, this decision addresses the Respondent's exceptions that were not addressed by the Authority in *Customs,* 60 FLRA at 952.

For the reasons that follow, we find that the Respondent violated § 7116(a)(1) and (5) of the Statute, as alleged in the complaint.

II. History of the Case

A. Facts

The facts in this case are set forth in the Judge's decision and are only briefly summarized here. The bargaining unit includes trainees who must meet proficiency standards in firearms skills, among other areas. The Respondent may terminate trainees for deficiencies in firearms skills during the probationary period.

In 1996, the Charging Party and the Respondent bargained over revisions to the Respondent's firearms policy, including training. The revised policy provided for an initial eight-hour training period followed by proficiency testing. To bring deficient trainees into compliance, the revised policy authorized up to eighty additional hours of remedial training. During the same period, the parties agreed to an (MOU) that, as relevant here, required the Respondent to give the Charging Party notice and an opportunity to bargain over changes to the firearms policy.

In 2002, the Respondent again revised its firearms policy, reducing the number of authorized remedial hours for firearms-deficient trainees from eighty to eight. The Respondent did not notify or bargain with the Charging Party prior to making these revisions.

B. Administrative Law Judge's Decision

The Judge found, based on the Charging Party's undisputed testimony, that "the provision for 80 hours in the 1996 [f]irearms [p]olicy was not a typographical error and that the subsequent reduction back to 8 hours was a substantive change." *Customs*, 60 FLRA at 959. The Judge also found that the reduction of remedial firearms training had more than a *de minimis* effect on conditions of employment and was subject to bargaining. The Judge concluded that, as the Respondent failed to give the Charging Party timely notice of, and an opportunity to bargain over, the change, it violated § 7116(a)(1) and (5) of the Statute. The Judge also found an independent violation of the Statute by virtue

of the Respondent's repudiation of the MOU. The Judge ordered, among other things, a *status quo ante* remedy.

C. The Authority's Decision in *Customs*

In *Customs*, 60 FLRA 943, the Authority found, contrary to the Judge, that the reduction of the number of remedial training hours for trainees did not have a greater than *de minimis* effect on conditions of employment. The Authority further found that the Respondent did not repudiate the MOU. *Id.* at 952. In view of this conclusion, the Authority did not address the Agency's remaining exceptions concerning the duty to bargain and the Judge's remedy. *Id.* at 952 n.10.

D. The Court's Decision in *Nat'l Border Patrol Council*

In *Nat'l Border Patrol Council,* the court concluded that the Authority erred in applying the *de minimis* standard. 446 F.3d at 167. Specifically, the court concluded that the Respondent's "massive change had a reasonably foreseeable, greater-than-*de-minimis* effect on working conditions." *Id.* In addition, based on its finding that the Authority improperly applied the *de minimis* standard, the court also set aside the Authority's finding that the Respondent did not repudiate the MOU. *Id.* The court remanded the case to the Authority for further proceedings. *Id*.

III. Preliminary Matter

As noted above, subsequent to the remand, the Respondent requested to supplement the record to address "remaining arguments . . . articulated" in its original exceptions as well as to consider post-hearing evidence concerning whether a *status quo ante* remedy is appropriate. Respondent's Request at 1. The GC and the Charging Party oppose the Respondent's request.

Although the Authority's Regulations do not provide for the filing of supplemental submissions, the Authority may, pursuant to 5 C.F.R. § 2429.26, "grant leave to file other documents as [it] deems appropriate." Here, the Respondent does not demonstrate a need to supplement the record in order to reiterate arguments and to introduce new evidence. Moreover, the Respondent acknowledges that the post-hearing evidence concerns negotiations that did not address remedial firearms training. Respondent's Request at 12. As such, we deny the Respondent's request. *See, e.g., Marine Corps Logistics Base, Barstow, Cal.,* 39 FLRA 1126, 1126 n.1 (1991) (motion to supplement agency's exceptions denied where supplemental information was deemed unnecessary).

IV. Analysis and Conclusions

Prior to implementing a change in conditions of employment, an agency is required to provide the exclusive representative with notice of the change and an opportunity to bargain over those aspects of the change that are within the duty to bargain where the change will have more than a *de minimis* effect on conditions of employment. *See United States Penitentiary, Leavenworth, Kan*., 55 FLRA 704, 715 (1999). Consistent with the court's decision in *Nat'l Border Patrol Council,* the reduction of the number of remedial training hours for trainees had a greater than *de minimis* effect on conditions of employment.

A. The Respondent's reduction in the number of remedial training hours was not substantively negotiable.

The extent to which an agency is required to bargain over changes in conditions of employment depends on the nature of the change. Specifically, a union may be entitled under the Statute to negotiate over the substance of the change. *See Fed. Bureau of Prisons, Fed. Corr. Inst., Bastrop, Tex.*, 55 FLRA 848, 852 (1999) (Chair Segal concurring) (*FCI Bastrop*). However, even if a change is not substantively negotiable, a change stemming from the exercise of a management right under § 7106(a) of the Statute, is subject to "impact and implementation" bargaining. *FCI Bastrop*, 55 FLRA at 852.

Applying the foregoing here, the Authority has found that the right to assign work under § 7106(a)(2)(B) of the Statute encompasses decisions as to the type of training to be assigned and the frequency and duration of such training. *See, e.g., United States, Dep't of Homeland Sec., United States Customs & Border Prot.*, 61 FLRA 113 (2005). Thus, contrary to the Judge, we find that the reduction in the number of remedial training hours resulted from the exercise of management's right to assign work. Accordingly, we find that the Respondent was obligated to engage in impact and implementation bargaining only. *See FCI Bastrop*, 55 FLRA at 852. However, as the Respondent was required, but failed, to provide the Charging Party with notice and an opportunity to bargain over the impact and implementation of the change, we conclude that the Judge did not err in finding that the Respondent violated § 7116(a)(1) and (5) of the Statute. [1] *See id.*

B. A *status quo ante* remedy is appropriate.

Where an agency has failed to bargain over the impact and implementation of a management decision,

the Authority evaluates the appropriateness of a *status quo ante* remedy using the factors set forth in *Federal Correctional Institution*, 8 FLRA 604 (1982) (*FCI*). [2] *See United States Army Corps of Eng'rs, Memphis Dist., Memphis, Tenn.,* 53 FLRA 79, 84 n.4 (1997). The *FCI* factors are: (1) whether and when notice was given to the union by the agency concerning the change; (2) whether and when the union requested bargaining; (3) the willfulness of the agency's conduct in failing to discharge its bargaining obligation; (4) the nature and extent of the adverse impact on unit employees; and (5) whether and to what degree a *status quo ante* remedy would disrupt or impact the efficiency and effectiveness of the agency's operations. *See United States INS, Wash., D.C.,* 55 FLRA 69, 70 n.3 (1999) (Member Wasserman dissenting as to another matter). The appropriateness of a *status quo ante* remedy must be determined on a case-by-case basis, carefully balancing the nature and circumstances of the particular violation against the degree of disruption in government operations that would be caused by such a remedy. *FCI*, 8 FLRA at 606.

With respect to the first three *FCI* factors, the Judge found, and the Respondent does not dispute, that the Respondent provided the Charging Party with notice of its decision to reduce the amount of remedial training hours, one month after the change had gone into effect. *See* Judge's Decision at 11, 18. The Respondent asserts that it "attempted" to give notice to the Charging Party of changes to the firearms policy and that it participated in good faith discussions regarding such changes. Exceptions at 28. However, the Respondent has not offered any evidence that the Judge erred in finding that it provided the Charging Party with notice of its decision only after the decision had become effective. *See Veterans Admin. Med. Ctr., Prescott, Ariz.,* 46 FLRA 471, 476-77 (1992) (*VAMC Prescott*) (*status quo ante* remedy appropriate when agency failed to give union notice prior to the change). Therefore, these *FCI* factors support a *status quo ante* remedy in this case.

With respect to the fourth factor, as discussed above, the court determined in *Nat'l Border Patrol Council,* 446 F.3d at 166-67, that a reduction in the number of remedial training hours from eighty to eight had more than a *de minimis* effect on working conditions, which resulted in an adverse impact on unit employees. *See also Soc. Sec. Admin., Gilroy Branch Office, Gilroy, Cal.*, 53 FLRA 1358, 1370 (1998) (judge's finding that change in appointment schedule had more than *de minimis* effect supported *status quo ante* remedy); *VAMC Prescott*, 46 FLRA at 476-77 (change in work schedules that was more than *de minimis* supported *status quo ante* remedy). Accordingly, the fourth *FCI* factor supports a *status quo ante* remedy in this case.

With respect to the fifth factor, it is well established that the Authority requires a respondent's argument regarding this factor to be "based on record evidence." *Army & Air Force Exch. Serv., Waco Distrib. Ctr., Waco, Tex.*, 53 FLRA 749, 763 (1997). The Respondent argues that a *status quo ante* remedy would disrupt the efficiency of its operations because a requirement to provide eighty hours of remedial training would force the Respondent to "expend excessive and potentially unnecessary hours to train an employee." Exceptions at 29. However, the Respondent has offered no evidence to support this argument. *See* Judge's Decision at 22. Accordingly, the fifth *FCI* factor supports finding that a *status quo ante* remedy is warranted.

For the foregoing reasons, we find that a *status quo ante* remedy is appropriate. *See United States Dep't of Def., Def. Commissary Agency, Peterson Air Force Base, Colo. Springs, Colo.*, 61 FLRA 688, 695 (2006); *VAMC Prescott*, 46 FLRA at 476-77.

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1. In reaching this conclusion, we find it unnecessary to address whether the Respondent repudiated the MOU because a finding of repudiation would be only cumulative and would not materially affect the remedy in this case. *See Cellco Partnership d/b/a Verizon Wireless*, 349 NLRB 640, 640 n. 5 (2007) (finding that respondent violated § 8(a)(1) of the National Labor Relations Act by prohibiting employees from discussing discipline they received, but finding it unnecessary to pass on judge's related finding that respondent unlawfully prohibited discussion of terms and conditions of employment, because such a finding would be cumulative and would not materially affect the remedy); *see also Fed. Prison System, Fed. Corr. Inst., Petersburg,, Va.*, 25 FLRA 210, 229 (1987) (judge found that the respondent violated the Statute by refusing to permit a particular individual to represent employees and that it was unnecessary to determine whether the respondent committed additional violation in connection with another employee because such a finding would be cumulative and would not affect the remedy); *cf. United States Dep't of Commerce, Nat'l Oceanic & and Atmospheric Admin., Nat'l Ocean Serv., Coast & Geodetic Survey Aeronautical Charting Div., Wash., D.C.*, 54 FLRA 987, 1007, 1016 n.20 (1998) (Member Wasserman dissenting in part) (finding that respondent's statement did not violate the Statute, but, even assuming it did, the remedy would not be materially affected).

2. As set forth above, the Judge found that the Respondent had a duty to bargain over the substance of the change. However, although a standard different from *FCI* applies when assessing whether a *status quo ante* remedy is appropriate in substantive bargaining cases, s*ee United States Dep't of the Air Force, 913th Air Wing, Willow Grove Air Reserve Station, Willow Grove, Pa.,* 57 FLRA 852, 857 n.9 (2002) (Member Pope dissenting as to another matter), the Judge applied *FCI*.

V. Order

Pursuant to § 2423.41 of Authority's Regulations and § 7118 of the Statute, the United States Department of Homeland Security, Border and Transportation Directorate, Bureau of Customs and Border Protection, Washington, D.C., shall:

1. Cease and desist from:

(a) Changing the working conditions of bargaining unit employees by making changes to the number of hours of remedial firearms training that Basic Trainee Officers may receive if they fail to qualify during Basic Marksmanship Instruction and Practical Pistol Courses.

(b) In any like or related manner, interfering with, restraining or coercing bargaining unit employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Rescind changes to the Agency's Firearms Policy by restoring to eighty hours as needed the amount of remedial firearms training that Basic Trainee Officers will receive should they fail to qualify during Basic Marksmanship Instruction and Practical Pistol Courses.

(b) Notify and, upon request, bargain with the American Federation of Government Employees, National Border Patrol Council, to the extent required by the Statute prior to implementing changes to the Agency's Firearms Policy.

(c) Post copies of the attached Notice for 60 days at all facilities where bargaining unit employees are assigned on forms to be furnished by the Authority. The Notice is to be signed by the Chief of the Border Patrol, or the highest equivalent agency official with direct authority over the Border Patrol and is to be posted in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced or covered with other material.